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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

RALPH SHERLOCK,
Petitioner,

VS.

MERCED UNION HIGH SCHOOL DISTRICT,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Must an intent to discriminate be proven to establish a violation of the Age Discrimination in Employment Act?

Is a violation of the Age Discrimination in Employment Act established by findings that a *prima facie* case has been proven and that the employer's proffered reason for discharge is not credible?

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RALPH SHERLOCK,

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MERCED UNION HIGH SCHOOL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner RALPH SHERLOCK respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Ninth Circuit entered in the above-entitled action on April 18, 1986.

OPINIONS BELOW

The United States District Court for the Eastern District of California entered

judgment for defendant MERCED UNION HIGH SCHOOL DISTRICT on June 27, 1984, after a bench trial. The court's Findings of Fact and Conclusions of Law are printed in Appendix A, infra, page 1, and the Judgment is printed in Appendix A, infra, page 23.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court on April 18, 1986. The Memorandum Decision of the Court of Appeals is printed in Appendix A, infra, page 25.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Age Discrimination in Employment Act, 29 U.S.C. § 623.

2. California Fair Employment and Housing Act, Government Code § 12941.

The full text of these statutory provisions is set out in Appendix B, infra, page 1.

STATEMENT OF CASE

Petitioner RALPH SHERLOCK was fifty-seven years old when his twenty year position as Assistant Superintendent for Instruction in respondent MERCED UNION HIGH SCHOOL DISTRICT was abolished by a young, newly appointed Superintendent. Rather than be subjected to the ridicule of demotion to a classroom teaching position, petitioner took early retirement. (Appendix A, infra, pages 2, 11-12)

Throughout his period of employment petitioner's job performance was exemplary. Respondent admitted that petitioner's

competence was never at issue. (Appendix A, infra, page 2)

The elimination of petitioner SHERLOCK's position was part of the Superintendent's reorganization of the administrative cabinet which impacted all those employees over fifty years old and left intact the only position held by an employee under forty years of age. (Appendix A, infra, pages 2, 3, 5, 16-17)

The oldest member of respondent's Board of Trustees voted against the reorganization in executive session. A younger member of the Board testified, however, that the new Superintendent was given the authority to review his administrative staff to "make it something he would feel comfortable working with." This same member expressed the view to a teacher that "fresh young blood" was needed in the District office. (Appendix A, infra pages 4-5, 14)

Respondent's sole articulated reason for the reorganization was a decline in state income. Since no decline in state income occurred, however, school employees were actually given raises and sabbatical leaves, and travel and conference expenditures were increased, the District Court found respondent's purported reason to be "not credible". (Appendix A, infra, pages 7-8)

A year after the reorganization took place, the administrative cabinet was again "reorganized" and returned to its original size and composition. (Appendix A, infra, page 17)

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE CASE AT BAR IS IN DIRECT CONFLICT WITH THE OPINIONS OF OTHER CIRCUIT COURTS AND THIS COURT REGARDING FUNDAMENTAL INTERPRETATIONS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The decision of the Court of Appeals for the Ninth Circuit conflicts with the opinions of other circuit courts and this Court on two important federal questions.

First, the Court of Appeals for the Ninth Circuit decided that proof of intentional discrimination is necessary to establish a violation of the Age Discrimination in Employment Act while other circuit courts have rejected such a requirement.

Second, the Court of Appeals for the Ninth Circuit repudiated Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) by declaring that plaintiff's burden of proof was not met by showing that a prima facie case had been established and that the employer's articulated reason for its action was not credible. Not a single reported case can be located in which such findings by a court have been insufficient to establish a violation of the Age Discrimination in Employment Act.

I

The Court of Appeals for the Ninth Circuit stated in its Memorandum Decision that "proof of intent to discriminate" is required in a disparate treatment claim under the Age Discrimination in Employment Act. (Appendix A, infra, pages 32-33) This interpretation of

the Age Discrimination in Employment Act is squarely in conflict with other circuit court decisions on the subject.

Unlike Title VII of the Civil Rights Act of 1964, which does require proof of intent to discriminate, the Age Discrimination in Employment Act explicitly differentiates between intentional and unintentional violations of the statute by providing for liquidated damages when an intentional or willful violation is proven. Trans World Airlines, Inc. v. H. Thurston, ____ U.S. ____, 105 S. Ct. 613, ____ L. Ed. 2d ____ (1985).

Although the proof requirements in an Age Discrimination in Employment Act case "are similar to the requirements in a Title VII action, no showing of the employer's intent to discriminate is necessary because Congress believed age discrimination is based on employers' false impressions concerning age,

which are capable of correction, rather than the invidious hostility present in racial and other forms of prejudice." Note, The Meaning of "Willful" under The Liquidated Damages Provision of the Age Discrimination in Employment Act, 68 IOWA L. REV. 333, 335 (1983).

Syvock v. Milwaukee Boiler Mfg. Co., Inc., 665 F. 2d 149, 155 (7th Cir. 1981) provides a careful analysis of the distinction between Title VII and the Age Discrimination in Employment Act:

> The legislative history of the ADEA suggests that the Congressional framers thought that non-willful discrimination directed towards an individual was quite possible. Unlike race discrimination, age discrimination may simply arise from an unconscious application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce.

> 'Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. Those discriminations result in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older jobseeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance. As a general rule, ability is ageless.' 113 Cong. Rec. 34,742 (1967) (remarks of Rep. Burke).

Hence, the court concluded:

> In Title VII cases alleging disparate treatment under McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." (citation omitted) If an inference of discriminatory motive were also crucial to recovery upon a disparate treatment theory under the ADEA, one could conclude that any ADEA violation premised upon

> disparate treatment is intentional and therefore liquidated damages should be automatic. As stated above, however, we agree with those courts that have allowed a finding of liability under the ADEA without any showing as to the defendant's state of mind. 665 F. 2d at 155, fn. 7.

The court in Kelly v. American Standard, Inc., 640 F. 2d 974, 980 (1981) concurred:

> The fact that Congress provided for special remedies in the case of willful violations implies that an employee can recover for accidental and unintended violations of the ADEA as well as those that are knowing or intentional.

See also Smith v. University of North Carolina, 632 F. 2d 316, 337 (4th Cir. 1980); Smith and Leggette, Recent Issues in Litigation Under the Age Discrimination Act, 41 OHIO ST. L. J. 349, 369 (1980).

The Court of Appeals for the Sixth Circuit has interpreted the Age Discrimination in Employment Act in the same manner. In Blackwell v. Sun Electric Corp.,

696 F. 2d 1176, 1184 (6th Cir. 1983) it decided:

> It appears that Congress, in adopting the liquidated damages provision, sought to distinguish cases in which there is intentional discrimination from those where the employer's discrimination is not intentional. This interpretation is buttressed by the fact that Congress evidently intended that a plaintiff be able to prove discrimination without proving intent to discriminate.

Unfortunately, because of the similarity in the analyses of cases brought under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act and the reliance upon Title VII precedents in ADEA actions, some circuit courts have erroneously assumed that the same intent requirement must be applied to an age discrimination claim as to a race or gender discrimination charge. See, e.g. Haddad v. Lockheed California Corp.,

720 F. 2d 1454, 1456 (9th Cir. 1983); Douglas v. Anderson, 656 F. 2d 528, 531 (9th Cir. 1981); Thornbrough v. Columbus & Greenville Railroad Company, 760 F. 2d 633, 638 (5th Cir. 1985).

The guidance of the Supreme Court is necessary to resolve this important conflict between the circuit courts and to clarify the proper standard for interpreting the Age Discrimination in Employment Act.

II

The decision of the Court of Appeals for the Ninth Circuit also imposes a heavier burden of proof on the plaintiff in an Age Discrimination in Employment Act suit than has been imposed by any other court. In

the case at bar the court decided that a violation of the Age Discrimination in Employment Act is not established by findings that a prima facie case has been proven and that the employer's articulated reason for its action is not credible. Such a conclusion rejects the clear precedent of both this Court and the other circuit courts.

As this Court stated so clearly in Texas Department of Community Affairs v. Burdine, supra at 256, the plaintiff may prove discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (emphasis mine). In short, pretext is shown

if "the evidence offered in support of the employer's explanation lacks credibility." Montoya v. Anderson, 511 F. Supp. 523, 525 (D. Colorado 1981); Thornbrough v. Columbus and Greenville R. Co., 760 F. 2d 633, 639-40 (5th Cir. 1985).

Using the standard laid down by this Court, petitioner SHERLOCK proved that the employer's "proffered explanation" was "unworthy of credence." The trial court made the specific finding that "the District's contention that the sole purpose for the administrative reorganization was economy is not credible." (Appendix A, infra, pages 7-8).

Instead of basing its judgment for respondent upon this standard, however, the trial court rendered its opinion on the basis

of its own "observation" that

> the administrative cadre of any medium size or large school district or county superintendent of schools in California would predominately consist of persons 50 years of age or older. Wholesale "shake-ups" in those cadres are not unusual when a new superintendent is hired or elected, as the case may be. (Appendix A, infra, page 18)

Such "observation" was not derived from any evidence in the record or even from respondent's argument.

Based upon this general observation the District Court concluded that the

> predominate(sic) factor in reorganizing the administrative cadre, as suggested by Dr. Girolamo and adopted carte blanche by the Board of Trustees, was the desire to create an administrative cadre with which the new Superintendent, Dr. Girolamo, was 'comfortable.' The age of the affected persons was a coincidence." (Appendix A, infra, page 18)

The Court of Appeals for the Ninth Circuit dismissed this glaring irregularity by simply noting that "the 'fiscal crisis' excuse, then, was not the only evidence that the court examined in reaching its conclusion that the ADEA was not violated." (Appendix A, infra, pages 35-36) What the Court of Appeals apparently did not consider, however, was the fact that there was no other evidence for the trial court to consider, unless a court's generalized observances of society's occurrences outside the courtroom are to be considered evidence.

To permit the trial court to substitute its own rationale for the employer's adverse action in place of the non-credible justification articulated by the employer itself would undermine the very basis of

the Texas Department of Community Affairs v. Burdine standard. As this Court has explained:

> Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions. 450 U.S. at 255-256.

When the court surmises after trial that the true reason for the employer's action was other than the rationale asserted at trial, the plaintiff has no opportunity at all, much less a full and fair opportunity, to

demonstrate pretext. 1/

1/ Moreover, even assuming, arguendo, that respondent had asserted the "comfort" reason for its decision, such explanation would not meet the Texas Department of Community Affairs v. Burdine standard that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific." 450 U.S. at 258. The "comfort" defense is neither clear nor specific. In fact, it is so vague and subjective that it does not qualify as a non-discriminatory explanation. Since age was a factor in the selection of the Superintendent, according to the trial court (Appendix A, infra, page 4), and since the Superintendent's reorganization replaced older men by younger men, "comfortable" seems to be synonymous with "younger." See e.g., Robbins v. White-Wilson, 660 F. 2d 1064 (5th Cir. 1981).

CONCLUSION

For the above reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision of the Court of Appeals for the Ninth Circuit.

DATED: July 10, 1986.

Respectfully submitted,

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APPENDIX A

ORIGINAL
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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

RALPH SHERLOCK, Plaintiff, vs. MERCED UNION HIGH SCHOOL DISTRICT, Defendant.	CV F 83-31-EDP FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Defendant Merced Union High School District is a school district duly organized and existing under the laws of the State of California and is an employer covered by the Age Discrimination in Employment Act and the Fair Employment and Housing Act. It lies solely within the Eastern District of California. As provided by California law,

it is governed by a publicly elected Board of Trustees.

2. Plaintiff Ralph Sherlock was employed by defendant Merced Union High School District from July 1, 1960 to June 30, 1982. During the last twenty (20) years of service with defendant he held the position of Assistant Superintendent for Instructional Services and performed his job duties in a competent manner. He was fifty-seven (57) years old when his employment was terminated on June 30, 1982. His employment was always based on yearly contracts.

3. In October of 1981, defendant relieved Glenn Taber, aged 57, of his duties as Assistant Superintendent for Business. On March 15, 1982, Mr. Taber received a Notice of Reassignment From A Position Requiring An Administrative or Supervisory Credential and at the end of the 1981-82 year, he left defendant District for employment at another school district. In the summer of 1982,

defendant hired Armand Levesque, aged 37, as Director of Business Services to perform the job duties previously performed by Mr. Taber.

4. On December 3, 1981, the employment of Robert Maxwell, aged 57, as Superintendent of defendant District was terminated although he was under contract to serve as Superintendent until June, 1984. Dr. Maxwell resigned effective June 30, 1982, so that an orderly transition to a new Superintendent could be accomplished. From December 1981, through June 1982, he assumed many of the business services job duties previously performed by Mr. Taber but continued to receive his salary as Superintendent. Dr. Maxwell and the Board of Trustees entered into a consultant contract under the terms of which Dr. Maxwell became an administrative advisor for defendant District during the academic years 1982-83 and 1983-84 with no specific duties and a salary of between $77,872.00 and $81,092.00.

5. Defendant did not open the position of Superintendent for application either from within or from without the Merced Union High School District. The Board of Trustees considered only one person, Robert Gilmore, a.k.a. Girolamo (hereinafter Girolamo), aged 41, and employed him as the Superintendent Designate on February 8, 1982.
Dr. Girolamo had been employed by defendant District for six months as the Atwater High School principal at the time he was appointed Superintendent Designate. Age was a factor in the decision to hire Girolamo as Superintendent.

6. At the end of January and beginning of February, 1983, Dr. Girolamo, Gil Grover, principal of North Campus, and at least two members of the Board of Trustees attended two or three lengthy meetings in Dr. Girolamo's office at Atwater High School.

7. On February 24, 1982, after an executive session, the Board of Trustees of

defendant District suggested that Dr. Girolamo review the existing administrative staff and "make it something he would feel comfortable with in terms of titles and positions."

8. On the morning of March 1, 1982, Dr. Girolamo informed plaintiff Sherlock that the positions of Assistant Superintendent were to be eliminated and replaced by the positions of Director and that the job duties of the Assistant Superintendent for Instructional Services and the Director of Personnel would be performed by a Director of Personnel and Instruction.

9. On the afternoon of March 1, 1983, Joseph Reeves, the Director of Personnel, stated to plaintiff that the Superintendent wanted Mr. Reeves to mention to plaintiff that the principalship of the Adult School might be a possible reassignment for plaintiff.

10. On March 3, 1982, the Board of

Trustees of defendant District ratified the recommendation of the Superintendent Designate that the Assistant Superintendent positions become Director positions and that the job duties of the Assistant Superintendent for Instructional Services and the Director of Personnel be performed by a Director of Personnel and Instruction effective June 30, 1982. At some point in time, the Board of Trustees discussed the possibility that the plaintiff would take early retirement rather than be demoted or assigned to classroom teaching.

11. Defendant's principal articulated reason for eliminating the positions of Assistant Superintendent and creating a new position of Director of Personnel and Instruction to perform the job duties of Assistant Superintendent of Instructional Services and Director of Personnel was a decline in state income. The income received by defendant District from the State of

California was $9,127,695.00 in 1980-81, $10,387,630.00 in 1981-82, and $10,039,862.00 in 1982-83. For the fiscal year 1978-79, defendant District ran up a cash-flow deficit of $604,159.00. Although during the 1979-80 fiscal year, defendant District's operations resulted in a surplus of $109,467.00, defendant District's operations during the 1980-81 fiscal year produced a cash-flow deficit of $353,463.00. This deficit financing was possible because of accumulated surpluses carried over from prior years.

These deficits occurred because of fluctuating enrollment (upon which state funds are based) and upon a decline in federal funding.

12. While it is not the Court's function to second guess the decisions of the Board of Trustees, when the overall budgets of the District are reviewed for the period in question, the District's contention that the sole purpose for the administrative

reorganization was economy is not credible.

13. The evidence does not establish that the age of plaintiff was a determining factor in either the decision by the Board of Trustees to reorganize the district level office or in the sending of the March 11, 1982, letter to plaintiff. The evidence does sustain the finding that Dr. Girolamo was given authority to establish an "administrative cabinet" composed of persons of his direct or indirect choosing.

14. On March 5, 1982, defendant District posted a Notice of Vacancy in the newly created position of Director of Instructional Services, and requested that applications for the position be submitted on or before March 19, 1982. The Notice of Vacancy for the position was posted at each campus as well as at the district level office. Plaintiff was aware of these notices. The plaintiff has testified unequivocally that he never had any doubt that he could apply for the newly

created position of Director of Curriculum and Personnel. Neither did he have any doubt that he would have been eligible to apply for several principalships that were opening up in the District. Despite this, plaintiff developed a state of mind that the reorganization was devised to embarrass and humiliate him, that he would not be seriously considered for any administrative position for which he might apply, and that classroom teaching was the role that had been chosen for him.

15. Discussions between defendant District and plaintiff concerning plaintiff obtaining a consultancy contract were initiated by plaintiff when plaintiff requested Joseph Reeves to contact the Superintendent to determine whether the Superintendent would recommend such a contract to the Board of Trustees. Plaintiff prepared the first draft of a consultancy contract, allowing for payment of $5,300.00

per year and a term of four or five years. Once Plaintiff presented the proposed contract, counsel for the District, Mr. Melbourne N. Gwin, was requested to and did visit plaintiff at his office at the District Office and advised that a five-year contract would be illegal and the parties then discussed a two-year contract with a renewal provision. The meeting with Mr. Gwin occurred on approximately March 8, 1982.

When plaintiff declined to execute the document presented to him at that time, Mr. Gwin stated that retirement was plaintiff's best option and that if plaintiff did not retire "we will put you back in the classroom and they won't give you any real reasons for it." When called as a witness, Mr. Gwin denied he made this statement. At an earlier deposition, he merely indicated he did not remember making the statement.

16. Prior to March 8, 1982, plaintiff had borrowed a personnel manual and had

calculated what his retirement pay would be if he took early retirement under Board Policy 6123, effective June 19, 1982. In the course of this review, plaintiff determined that his retirement pay would be within approximately $20.00 per month of his pay as a teacher. Inferentially, he determined that retirement plus a consultant's contract would be more beneficial economically.

17. As required by the California Education Code, § 44951, plaintiff was sent timely Notice of Reassignment from a Position Requiring an Administrative or Supervisory Credential. The letter stated, in pertinent part, that: "In the event you are transferred to a teaching position, you may request a written statement of the reasons for the transfer under the provisions of Education Code Section 44896. Copies of Sections 44896 and 44951 are enclosed. A final decision regarding your assignment for next year will be made on or before July 1,

1982."

18. Although plaintiff had tenure as a classroom teacher, plaintiff had not held a teaching position for thirty years and his only experience in the classroom consisted of a combined teaching and counselling job which he had held for three years while he was still in his twenties.

19. Plaintiff felt that a return to the classroom would be a gravely humiliating and frightening experience. Moreover, the income from plaintiff's retirement benefits would be only slightly less than a teacher's salary.

20. Under California law, administrative personnel do not acquire tenure.

21. The expiration date for applications to be made for appointment to the newly created administrative position which encompassed plaintiff's former position closed on March 19, 1982. Plaintiff did not apply. Joseph Reeves, whose age was 57 years, applied for the position and placed

second in the competitive interview. He was later appointed principal of Merced Union High School.

22. On March 17, 1982, plaintiff signed a consultant contract with defendant District, and on March 24, 1982, he submitted his resignation effective June 30, 1982. Defendant District became obligated to pay $22,065.44 to the State Teachers Retirement System as a result of plaintiff's early retirement. Defendant also became obligated to pay $10,600.00 to plaintiff on account of his consultant contract.

23. On March 15, 1982, Gil Grover called a special meeting of the North Campus High School faculty at which he implied that he expected to be appointed as the newly created Director of Personnel and Instruction. His statements confirmed the opinion of the teachers on the campus that he was certain to be chosen for the position. When Sharon Gray discussed her application for Director of

Personnel and Instruction with Judy Carr, a member of the Board of Trustees of defendant District on March 17, 1982, Ms. Carr stated that "Gil would never forgive me" if Ms. Gray were appointed to the position instead of himself. Ms. Carr also stated to Ms. Gray that defendant needed "fresh young blood" in the District Office.

24. Interviews for the newly created Director of Personnel and Instruction were held on March 23, 1982, for the six qualified candidates. The interview process was conducted in accordance with established policies of defendant District. The membership on the committee which interviewed for the position consisted of eight individuals: One District Administrator, two site level administrators, two teacher representatives, one affirmative action representative, one classified employee representative and one representative from the Citizen's Advisory Board. With the

exception of three administrative representatives, the remaining five representatives were selected by their respective constituencies and the administration played no role in the selection of those individuals.

25. All the qualified candidates who applied for the consolidated position were interviewed by the committee with the rating by each member of the committee given the same weight. The total of the raw rating scores for each of the six candidates, together with their names, are as follows: Jane Maxwell, 270; Mike Cuchna, 283; Keith Has Ellison, 188; Gil Grover, 362; Steve Gomes, 211; and Joe Reeves, 303. The application process also included a written exercise.

26. The chairman of the interview committee, Joe Brucia, forwarded the raw scores on to the Superintendent and thereafter, the Superintendent recommended

that Gil Grover, the person receiving the highest score, be appointed to the position. On April 14, 1982, the Board appointed Mr. Grover to the newly created position of Director of Instructional Services, effective July 1, 1982.

27. In early March of 1983, Gil Grover suggested to Fred Olson, Dean of Students at Atwater High School and at age 57, the oldest remaining administrator in defendant District, that he consider early retirement. When Mr. Olson replied that he was not interested in retiring early, Mr. Grover stated that he would be reassigned. On March 15, 1983, Mr. Olson received a Notice of Possible Reassignment from a Position Requiring an Administrative or Supervisory Credential. When he filed suit to prevent the reassignment, the Board of Trustees decided that he could retain his administrative position.

28. In the 1982-83 academic year the

administrative cabinet of defendant District included Dr. Girolamo, aged 41, as Superintendent; Armand Levesque, aged 37, as Director of Business Services; Gil Grover, aged 52, as Director of Personnel and Instruction; and Joe Brucia, aged 40, as Director of Special Projects.

29. At the commencement of the 1983-84 academic year the job duties of personnel and instruction were separated and a new position, Coordinator of Instruction, was created. Mike Crass, aged late 30's, was hired as the Coordinator of Instruction. Hence, for the 1983-84 academic year, the administrative cabinet had increased to Dr. Girolamo as Superintendent; Armand Levesque as Director of Business Services; Gil Grover as Director of Personnel; Joe Brucia as Director of Instruction; and Mike Crass as Coordinator of Instruction.

30. In early April, 1984, Gil Grover was appointed Assistant Superintendent effective

June 30, 1984.

31. The predominate factor in reorganizing the administrative cadre, as suggested by Dr. Girolamo and adopted carte blanche by the Board of Trustees, was the desire to create an administrative cadre with which the new Superintendent, Dr. Girolamo, was "comfortable." The age of the affected persons was a coincidence. 1/

32. On May 17, 1982, the Board of Trustees filled three vacancies in principalships at various campuses, as follows:

Joseph Reeves, Merced High School North; Larry Johnson, Atwater High School; and John Lenker, Livingston High School.

1/ From the Court's observation, the administrative cadre of any medium size or large school district or county superintendent of schools in California would predominately consist of persons 50 years of age or older. Wholesale "shake-ups" in those cadres are not unusual when a new superintendent is hired or elected, as the case may be.

The three principal positions were filled in accordance with the District's standard hiring procedures, including ratings by the committee. The appointments to the principalship became effective July 1, 1982. Plaintiff did not apply for any of the school principalship positions. The opening in the position at Livingston High School had been created in December 1981, with the announcement of the early retirement of the then principal under Board Policy 6123.

33. Plaintiff continued to serve as Assistant Superintendent of Instruction through the remainder of the 1981-82 contract year and received full salary and benefits under that contract.

CONCLUSIONS OF LAW

A. The Court has jurisdiction of the parties and the subject matter of this action. Venue in the Eastern District of California is proper.

B. Defendant's powers are governed by

the laws of the State of California which must be exercised in accordance with federal laws and regulations.

C. Plaintiff held no tenure in his position as an administrator, nor did plaintiff hold permanent status in his position as administrator.

D. Liability under the Age Discrimination in Employment Act (29 U.S.C. §§ 621, et seq.) requires that the defendant intended to discriminate on the basis of age. Such intention only exists where age of the plaintiff was the determining factor in the defendant's decision adversely affecting the plaintiff. Age is a determining factor only if, but for the defendant's motive to discriminate against plaintiff because of his age, the employment decision would not have been made.

E. A constructive discharge only exists where the working conditions of plaintiff would become so difficult or unpleasant that

a reasonable person in the defendant's shoes would have felt compelled to resign. In determining whether constructive discharge exists, an objective standard is employed.

F. Neither the Notice of Reassignment required by California Education Code § 44951, nor attorney Gwin's statement that the plaintiff would be assigned to the classroom constituted final Board action. California law provides a due process procedure to allow administrative personnel to test the validity of such reassignments. The Court concludes, on the basis of all the evidence, that the defendant was not constructively discharged.

G. Plaintiff's termination of his employment was the result of his psychological reaction to the Plan of Reorganization, and the subjective belief that it was "aimed" at him. The evidence does not sustain this conclusion.

H. Plaintiff, by accepting a consulting

contract with the District is not estopped to pursue any legal remedy he may have against the District.

I. Defendant did not discriminate against the plaintiff in violation of the Age Discrimination in Employment Act.

J. Defendant did not violate the California Doctrine of The Implied Covenant of Good Faith and Fair Dealing in adopting the administrative reorganization plan and eliminating plaintiff's former position.

K. Defendant's counsel is directed to lodge a judgment with the Clerk in accordance with these Findings of Fact and Conclusions of Law within 20 days of the date of this Order. Plaintiffs counsel may file objections to the form of such lodged judgment, if desired, in accordance with the Local Rules of Practice for the Eastern District of California.

DATED: June 12, 1984.

EDWARD DEAN PRICE
United States District Judge

LODGED **ENTERED** **FILED**
June 19, 1984 June 29, 1984 June 27, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

RALPH SHERLOCK,	)	
	)	
Plaintiff,	)	CV F 83-31-EDP
	)	
v.	)	JUDGMENT
	)	
MERCED UNION HIGH SCHOOL DISTRICT,	)	
	)	
Defendant.	)	
	)	

This action came on for trial before the Court, Honorable E. Dean Price, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered:

IT IS HEREBY ORDERED AND ADJUDGED:

That the Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendant, MERCED UNION HIGH SCHOOL DISTRICT, recover of the Plaintiff,

RALPH SHERLOCK, its costs of action.

Dated at Fresno, California, this 27 day of June, 1984.

EDWARD DEAN PRICE
United States District Judge

NOT FOR PUBLICATION

FILED
APRIL 18, 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH SHERLOCK Plaintiff-Appellant, v. MERCED UNION HIGH SCHOOL DISTRICT, Defendant-Appellee.	No. 84-2279 DC# CV-F-83-31-EDP MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Edward Dean Price, District Judge, Presiding
Argued and Submitted February 12, 1986
San Francisco, California

Before: SNEED and HALL, Circuit Judges, and KELLEHER**, District Judge.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

**Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

Ralph Sherlock appeals from the adverse decision of the district court, after a bench trial, on his claims of age discrimination, in violation of federal and state law, and of breach of the implied covenant of good faith and fair dealing. We affirm the district court's judgment.

I.

FACTS AND PROCEEDINGS BELOW

For reasons about which the parties disagree in this case, Ralph Sherlock's position as Assistant Superintendent for Instructional Services was eliminated in a reorganization of the Merced Union High School District's (Merced) administrative structure. Sherlock, who was 57 at the time of the reorganization, claims that Merced discriminated against him because of his age, in violation of both the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 (1982),

and the California Fair Employment and Housing Act (FEHA), Cal. Gov. Code § 12940 (West 1980). Merced contends that the reorganization was motivated, at least in part, by a desire to correct its budgetary problems. See Brief of Appellee at 3-6.

The parties differ markedly in their statements of the pertinent sequence of events. Merced explains the situation that led to the current dispute in the following way. In late 1981 and early 1982, Merced discovered its fiscal problems when Glenn Taber, the Assistant Supervisor for Business, informed the district that its budget could not support a seven percent pay raise for its teachers. On December 3, 1981, District Superintendent Maxwell resigned and the Board of Trustees hired Dr. Robert Girolamo to replace him. Girolamo proposed a reorganization of administrative personnel.

The Board of Trustees approved the

reorganization plan, and on March 5, 1982, Merced posted notices of the opening for the consolidated position of Director of Personnel and Instruction. Several people applied, including Gilbert Grover, age 52, and Joseph Reeves, age 54. Sherlock did not apply. Instead, he spoke with Girolamo about the possibility of becoming a curriculum consultant upon his retirement. Sherlock eventually obtained such a contract. Merced alleges that Sherlock's reason for refusing to apply for the consolidated position or for one of the principalships offered during the restructuring of the school district's administration was his belief "that the reorganization was devised to humiliate and embarrass him, and that he would not be considered seriously for any administrative position." See Brief of Appellee at 8-9.

Sherlock's version is, understandably, quite different. He questions the Board's

motives in hiring Girolamo and also takes issue with Merced's proffered reason for the reorganization -- the fiscal difficulties. See Appellant's Opening Brief at 7-8. Sherlock contends that his "first inkling that his job might be in jeopardy," id. at 5, occurred at a Board meeting on February 24, 1982, when the Board members "avoided eye contact and social intercourse with him for the first time in . . . twenty years," id. The next week, Girolamo told Sherlock about the proposed reorganization. Sherlock acknowledges that the possibilities of a consultant contract and a principalship were discussed. On March 15, 1982, Sherlock received a "Notice of Reassignment From a Position Requiring an Administrative or Supervisory Credential." The reassignment was to a teaching position. Convinced that he would not be seriously considered for the consolidated position of Director of Personnel

and Instruction, he negotiated a contract for the job of curriculum consultant.

After the reshuffling from the reorganization ended, the administrative staff consisted of Robert Girolamo, Superintendent, age 41; Armand Levesque, Director of Business Services (replacing Taber), age 37; Gil Grover, Director of Personnel and Instruction, age 52; and Joe Brucia, Director of Special Projects, age 40. Another administrator, Fred Olson, received a notice of reassignment in March 1983. Olson was 57 at the time; after he filed suit protesting the reassignment, the Board permitted him to retain his position. At the beginning of the 1983-84 school year, Mike Crass, whose age is estimated to be somewhere in the late 30s, became the Coordinator of Instruction. Grover was promoted to Assistant Superintendent in April 1984.

The district court found, among other

things, that age was a factor in Girolamo's hiring, that the Board told Girolamo to make his administrative staff "something he would feel comfortable with in terms of titles and positions," that Merced's "principal articulated reason" for the reorganization "was a decline in state income" and that this reason was not credible, that Sherlock knew that he could apply for other positions, and that "[t]he evidence does not establish that . . . age . . . was a determining factor" in either the reorganization or in the Notice of Reassignment letter. See Excerpt of Record (E.R.) at 30-35. Instead, "[t]he predominate [sic] factor in [the] reorganiz[ation] was the desire to create an administrative cadre with which the new Superintendent . . . was 'comfortable.'" Id. at 40-41. In its conclusions of law, the court held that Sherlock was not constructively discharged and that Merced did not violate the ADEA or breach

the implied covenant of good faith and fair dealing. See id. at 41-43.

II.

DISCUSSION

A. The district court did not err in requiring that Sherlock prove intent to discriminate before he could recover under the ADEA

Sherlock asserts that he need not prove intent in order to establish an ADEA violation and that the district court erred by requiring him to establish such an intent. Merced responds that Sherlock's allegation of age discrimination rests on a "disparate treatment" theory -- in which he claims that he was singled out for unfair treatment based on his age -- instead of a "disparate impact" theory. See, e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977). Merced's response is correct. Sherlock only sets forth a disparate treatment claim, which, under the ADEA,

requires proof of intent to discriminate. See Haddad v. Lockheed California Corp., 720 F. 2d 1454, 1456 (9th Cir. 1983); Douglas v. Anderson, 656 F. 2d 528, 531 (9th Cir. 1981). Even if the district court's statement of the law was incomplete, it was correct with respect to disparate treatment claims.

B. The district court did not err in its conclusion of law in which the role age must play in establishing a violation of the ADEA is described

The district court explained the law on ADEA violations in part by noting: "Such intention [to discriminate] only exists where [the] age of the plaintiff was the determining factor in the defendant's decision adversely affecting the plaintiff." E.R. at 40. Sherlock argues that the court erred in using the word "the" in referring to the "determining factor" causation requirement. Sherlock ignores the context of this sentence. When the sentence in question is read in

conjunction with the sentence explaining what the court meant by the phrase "determining factor," the court's conclusion of law is not in error. From the surrounding language in that particular conclusion, and from the court's use of the phrase "a determining factor" in Finding of Fact No. 13, see E.R. at 34, it is obvious that the court understood that "age must 'make a difference' between termination and retention of the employee in the sense that, but for the presence of age discrimination, the employee would not have been discharged." Cancellier v. Federated Dept. Stores, 672 F. 2d 1312, 1316 (9th Cir.), cert. denied, 459 U.S. 859 (1982). That is, the district court adopted the "but for" analysis of Cancellier. Therefore, in the particular content here, the court's casual use of the word "the" instead of "a" is not error.

C. The district court did not err in concluding that Merced had not violated the ADEA

Sherlock claims that the district court erred twice in holding that Merced had not violated the ADEA: first, by failing to give full and proper effect to its own finding on the "fiscal crisis" defense's lack of credibility, and second, by making certain findings of fact that were clearly erroneous.

His first contention is that the court's finding that Merced's "fiscal crisis" explanation was not "worthy of credence" obligated the court to find that Merced violated the ADEA. Unfortunately, this argument assumes that the court considered the "fiscal crisis" explanation the sole proffered explanation. On the contrary, the court found that the reorganization was motivated by "the desire to create an administrative cadre with which the new Superintendent . . . was 'comfortable.'" E.R. at 40. The "fiscal

crisis" excuse, then, was not the only evidence that the court examined in reaching its conclusion that the ADEA was not violated.

Sherlock's second reason (derived from various parts of his briefs) for attacking the district court's holding is based on a list of six separate allegedly erroneous findings of fact, only two of which merit attention.1/ First, he claims that Finding of Fact No. 11 -- which calls the "fiscal crisis" reason the "principal articulated reason," E.R. at 33 -- is inconsistent with Girolamo's admission that the "fiscal crisis" reason for the reorganization was the sole motivation. He is incorrect. Other testimony exists to support the court's conclusion that another reason existed for the reorganization. See, e.g., 2 R.T. at 143, 168-69, 172. Second, he takes issue with the "administrative cadre" justification for the reorganization (Findings of Fact Nos. 13 and 31, E.R. at 34, 40-42).

He argues that, when the fact that only the people in the protected age group were adversely affected by the reorganization is joined with a finding that "[a]ge was a factor in the decision to hire Girolamo," E.R. at 32, the district court could only find that Merced violated the ADEA. A finding that age was a factor in hiring Girolamo is not equivalent to a finding that but for Sherlock's age he would not have been affected by the reorganization. See Kelly v. American Standard, Inc., 640 F. 2d 974, 984 (9th Cir. 1981). Therefore, the district court's Findings of Fact Nos. 13 and 31 were not clearly erroneous. The four remaining objections to the district court's findings of fact -- one objection to judicial notice, and three objections to findings that are clearly supported by the record -- are frivolous.

E. The district court did not err in concluding that Sherlock had not been constructively discharged

The district court, in addition to concluding that Merced had not breached the implied covenant of good faith and fair dealing. see E.R. at 43, concluded that Sherlock had not been constructively discharged.2/ See id. at 42, 43. It defined constructive discharge as a situation in which "the working conditions of [the] plaintiff would become so difficult or unpleasant that a reasonable person in the defendant's shoes would have been compelled to resign." E.R. at 42. Sherlock does not challenge the wording of the court's conclusion. Moreover, substantial evidence supports the court's conclusion. Sherlock was not tenured as an administrator; he was tenured as a school-teacher. See Barthuli v. Board of Trustees, 19 Cal. 3d 717, 721, 566 P.2d 261, 264, 139 Cal. Rptr. 627, 629 (1977). The position of

classroom teacher was available, but Sherlock did not wish to become a teacher again. See E.R. at 37. He could have applied for other administrative positions, 3/ but he chose instead to opt for becoming a consultant upon his retirement. See id. at 41. California law does not require employers to permanently maintain employees in fixed positions, with fixed job titles and duties. The district court correctly concluded that Merced had neither breached the implied covenant of good faith and fair dealing nor constructively discharged Sherlock.

E. The district court did not err by refusing to hold for Sherlock on the California FEHA claim

Sherlock's only remaining claim is his FEHA claim. Both in his brief and at oral argument, Sherlock argued that the AEDA and FEHA claims were to be treated in the same way. It follows, therefore, that inasmuch as his ADEA claim has failed, so must his claim

under the FEHA.

F. Sherlock is not entitled to attorneys' fees on appeal

Sherlock requests attorneys' fees for hi ADEA appeal. Since he does not prevail on this claim, we deny this request. See Cancellier, 672 F. 2d at 1320.

AFFIRMED.

FOOTNOTES

1. A district court's findings of fact and its credibility determinations are reviewed under the clearly erroneous standard. United States v. Good, 780 F. 2d 773, 774 (9th Cir. 1986).

2. We review de novo district court determinations of state law. In re McLinn, 729 F. 2d 1395, 1397 (9th Cir. 1984) (en banc).

3. The court specifically found that Sherlock knew that other administrative positions existed. See E.R. at 34-35.

APPENDIX B

29 U.S.C. § 623

(a) Employer Practices

It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual

(c) Labor organization practices

It shall be unlawful for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individuals' age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT,

Government Code § 12941

(a) It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action. This section shall not be construed to make unlawful the rejection or termination of employment where the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held, or to require any changes in any bona fide retirement or pension programs or existing collective-bargaining agreements during the life of the contract, or until

January 1, 1980, whichever occurs first, nor shall this section preclude such physical and medical examinations of applicants and employees as an employer may make or have made to determine fitness for the job or position sought or held.

Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, and trade schools shall not, in and of themselves, constitute a violation of this section.

(b) This section shall not limit the right of an employer, employment agency, or labor union to select or refer the better qualified person from among all applicants for a job. The burden of proving a violation of this section shall be upon the person or

persons claiming that the violation occurred.***

CERTIFICATE OF SERVICE

I hereby certify that printed copies of the Petition for Writ of Certiorari to the Court of Appeal for the Ninth Circuit for Petitioner Ralph Sherlock in the above-captioned case have been served upon those parties listed below by placing the same in the United States Mail, postage prepaid, properly addressed, this 16th day of July, 1986, to:

Clerk of the Supreme Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543
(40 copies)

Mark I. Schickman, Esq.
Kathy L. Dyer, Esq.
LAW OFFICES OF MARK I. SCHICKMAN
240 Stockton Street, Suite 500
San Francisco, California 94108

Executed this 16th day of July, 1986, at Fresno, California.

Margaret Gaeta

Supreme Court, U.S.
FILED
AUG 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-127

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

RALPH SHERLOCK,
Petitioner,

vs.

MERCED UNION HIGH SCHOOL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT MERCED UNION HIGH SCHOOL DISTRICT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK I. SCHICKMAN
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Attorneys for Respondent Merced Union High School District

QUESTIONS PRESENTED

Did the lower courts correctly rule that, as part of Mr. Sherlock's disparate treatment claim, he had to show some intent to discriminate against him because of his age?

Where the District Court found that age was not a determining factor in the School District's conduct, must it, nonetheless, find a *per se* ADEA violation if it disbelieves any part of the defendant's evidence?

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Respondent MERCED UNION HIGH SCHOOL DISTRICT respectfully submits its opposition to the pending Petition for a Writ of Certiorari in the above captioned action.

OPINIONS BELOW AND JURISDICTION

Respondent School District agrees with Petitioner's reference to the Opinions Below, and to his jurisdictional statement.

STATUTES INVOLVED

In addition to the statutes referred to in the Petition, this matter involves California Education Code §§ 44893 and 44951. The full texts of those statutory provisions are set forth in Appendix A, attached hereto.

RESPONDENT'S STATEMENT OF THE CASE

From 1962 to 1982, Petitioner RALPH SHERLOCK was Assistant Superintendent for

Instruction for Respondent MERCED UNION HIGH SCHOOL DISTRICT. In February, 1982, the District's Board of Trustees approved an administrative reorganization, in which Sherlock's position, and that of Director of Personnel, were merged into the one position of Director of Personnel and Instruction.

California law does not provide tenure for administrative positions; rather, Mr. Sherlock maintained his tenure as a teacher throughout his twenty year administrative career. Consistent with the mandate of California law, on March 15, 1982, Mr. Sherlock received the "Notice of Reassignment" required by Education Code § 44951, advising him of his right to take a teaching position. Mr. Sherlock was also urged to apply for an open principalship, and to apply for the new consolidated administrative position.

The administrative position was filled by 52-year old Gil Grover, who obtained the highest rating score from an interview committee composed of three administration representatives, and five independent representatives. Joseph Reeves, age 57, placed second in that process, and was appointed principal of Merced Union High School.

Before applying for any teaching or administrative position, Sherlock calculated the sum of his retirement pension, and proposed a "consulting agreement" which would make up the difference between his pension and his pay as a teacher. After determining "that retirement plus a consultant's contract would be more beneficial economically" (Petition Appendix, p. 11), Sherlock decided neither to apply for any principalship or administrative office, nor to accept a teaching position to

which he had a tenured right. Rather, he opted for early retirement, and a consulting position.

After doing so, Sherlock filed this action, alleging that he was constructively discharged because of his age. After a bench trial, the court determined that Sherlock was not constructively discharged at all, and that he was not the victim of any disparate treatment because of his age.

Sherlock appealed to the Ninth Circuit Court of Appeals, which rejected each of his arguments -- -- including several that it deemed "frivolous." Sherlock seeks a review of that decision.

REASONS FOR DENYING THE WRIT

The Ninth Circuit plainly followed the express and oft-stated rules announced by this

Court for determining age discrimination actions. Any fair statement of the "Questions Presented" to this Court would make that clear.

The Ninth Circuit did not hold that "intent to discriminate must be proven to establish a violation of the ADEA," and that question need not be presented to the Court. Rather, the Ninth Circuit held that this kind of "disparate treatment" case required proof of an intent to discriminate on the basis of age. That clear statement of law has been uniformly approved by the circuits, following this Court's instruction in footnote 15 of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

Similarly, the trial court did not find "that the employer's proffered reason for discharge is not credible." Indeed, the trial

court found no discharge at all -- -- but, rather, Mr. Sherlock's voluntary retirement and his failure to apply for, or accept, the available positions. Moreover, as the Ninth Circuit expressly noted, the district court's finding that "the District's contention that the sole purpose for the administrative reorganization was economy is not credible" is *not* inconsistent with the district court's finding that there was no age discrimination practiced against Mr. Sherlock.

When viewed in their natural contexts, it is clear that neither of the two questions presented by petitioner warrant review by this Court.

I. THE FACTS OF THIS CASE MAKE MR. SHERLOCK'S LEGAL ASSERTIONS MOOT

One basic factual issue makes this case a wholly inappropriate vehicle for the legal

assertions presented by Mr. Sherlock: he was not discharged at all but, rather, "he determined that retirement plus a consultant's contract would be more beneficial economically [than working]" (Petition Appendix, p. 11, Finding of Fact 16). The Court of Appeals agreed that "substantial evidence supports the Court's conclusions" that Sherlock "had not been constructively discharged." (Petition Appendix, p. 38.)

Sherlock was tenured as a school teacher, not as an administrator (*Id.*). California Education Code § 44893 codifies California's public policy which prohibits administrative tenure, and expressly protects a School District's right to return an employee to the classroom.

Sherlock did not want to become a teacher again (Petition Appendix, p. 39). Nor did he

apply for the open principalships and administrative positions, even though he knew they were available, and he was invited to apply. Rather, he decided to retire because he calculated that it was to his financial interest to do so (Petition Appendix, pp. 10-11, Finding of Fact 16), and because of his erroneous subjective belief that the reorganization was "aimed at him" (Petition Appendix p. 21, Conclusion of Law G).[1]

---

1 Mr. Sherlock concedes this point in his Petition, admitting that "[r]ather than be subjected to the ridicule of demotion to a classroom teaching position, petitioner took early retirement" (Petition, p. 3). To the contrary, California law views the transfer of an administrative employee to the classroom to be a power integral to the efficient operation of a school system -- -- and not "the ridicule of demotion." The district court was clearly correct in rejecting Sherlock's subjective view that the reassignment was designed to humiliate him; the express text of the Education Code supports the court's conclusion.

On the facts, Mr. Sherlock voluntarily left the school district for his own well-considered economic reasons, and for his own poorly conceived emotional reasons. There is no possible challenge to the finding that he was not constructively discharged. Given those facts, this case does not provide the vehicle for disposing of the legal questions presented by Mr. Sherlock -- -- even if he had expressed those issues fairly.

II. THE CIRCUITS ALL AGREE WITH THIS COURT THAT INTENT IS AN INTEGRAL ELEMENT OF PROOF IN THIS KIND OF DISPARATE TREATMENT ACTION

In this disparate treatment case, Mr. Sherlock alleged that his administrative position was eliminated because of his age. In that factual context, the ADEA does not afford Mr. Sherlock relief if his position had been eliminated for any reason *other than* his

age. Therefore, the district court properly held that the elimination of Mr. Sherlock's position was actionable "only if, but for the defendant's motive to discriminate against the plaintiff because of his age, the employment decision would not have been made." (Petition Appendix, p. 20).

The Ninth Circuit considered and approved that holding (Petition Appendix, pp. 32-33), and focused upon the distinction between a disparate impact theory (which requires no proof of intent to discriminate) and a disparate treatment theory (which does require such proof).

This Court clearly made that distinction in footnote 15 of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977). But it is that very distinction which Mr. Sherlock has consistently ignored

in his arguments at all levels of the federal courts.

Therefore, Sherlock's citations to *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983), and *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981), are inapposite. Those cases stand for the proposition that intent need not be proven in a *disparate impact* case; they do not disturb the uniform authority which requires such proof in a disparate treatment case.

Mr. Sherlock similarly overreaches in citing to *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149 (7th Cir. 1981), as providing "a careful analysis" of a contrary view. The *Syvock* court was discussing the availability of liquidated damages, and not the elements of proof in a disparate treatment action. Nor has *Syvock* ever been cited by

any court for the proposition that a disparate treatment case may be proven absent an intent to discriminate.[2] Indeed, three years after the *Syvock* decision, the Seventh Circuit in *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984), made clear that motive is an element to prove disparate treatment.

Moreover, the *Syvock* analysis was rejected by the *Blackwell* court cited by Sherlock. Immediately following the paragraph quoted by Petitioner, the *Blackwell* court noted that "every showing of intentional discrimination does not entitle the plaintiff

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2 The *Syvock* court's concern that proving intent would lead to the automatic imposition of liquidated damages in a disparate treatment case is laid to rest by this Court's ruling in *TWA v. Thurston*, ___ U.S. ___, 105 S.Ct. 613, ____ L.Ed. 2d _____ (1985), in which the Court defined "willful" within the meaning of the ADEA.

to liquidated damages" (696 F.2d 1176 at 1184). Thus, *Blackwell* rejects the analytical underpinning of the *Syvock* dictum upon which Sherlock bases his argument.

In addition to those cited by the Petitioner, among the other circuits which agree that an intent to discriminate must be part of a disparate treatment claim are: Second Circuit: *Goodman v. Heublein*, 645 F.2d 127, 131 (2d Cir. 1980); *Parcinski v. Outlet Co.*, 673 F.2d 34, 36 (2d Cir. 1982); Third Circuit: *Massarsky v. General Motors*, 706 F.2d 111, 117 (3rd Cir. 1982); Fourth Circuit: *Fink v. Western Electric*, 798 F.2d 909, 915 (4th Cir. 1983); Sixth Circuit: *Laugesen v. Anaconda Co.*, 510 F.2d 307, 314 (6th Cir.) *cert. denied* 422 U.S. 1045 (1975); Eighth Circuit: *Bell v. Bolger*, 535 F.Supp. 997, 1001 (D.C.Mo. 1982), *aff'd Bell v.*

Bolger, 708 F.2d 1312, 1316 (8th Cir. 1983); D.C. Circuit: *Johnson v. Lehman*, 679 F.2d 918, 922 (D.C. Cir. 1982); *Sales v. Department of Justice*, 549 F.Supp. 1176 (D.D.C.), *aff'd*. 717 F.2d 1480 (D.C. Cir. 1982).[3] No decision of any circuit court has been cited for the contrary proposition, for to do so would directly contradict this Court's express pronouncement in footnote 15 of *International Brotherhood of Teamsters*, *supra*.

This Court's distinction between disparate impact and disparate treatment cases has governed this field for the past decade. The circuits are uniform in following that analysis. Neither the isolated dictum in *Syvock*,

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3 See also, *Kentroti v. Frontier Airlines*, 585 F.2d 967, 969 (10th Cir. 1978); *Horn v. Bibb County Commission*, 713 F.2d 689, 691 (11th Cir. 1983).

nor the facts of this case, justify any departure from that clear and well understood standard.

III. MR. SHERLOCK'S RIGID AND MECHANICAL INTERPRETATION OF THE *McDONNELL DOUGLAS* FORMULA HAS BEEN REJECTED BY THIS COURT, AND MISCONSTRUES THE FACTS OF THIS CASE

This Court's landmark decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), set forth the basic standard of proof in employment discrimination actions. Unfortunately, that decision was often followed *too* strictly, as if it provided the sole method of proof in any discrimination action; therefore, this Court repeatedly cautioned that the *McDonnell Douglas* test provided only one way of analyzing a case, that it must be tailored to the facts of each particular case, and that it was not to be applied formalistically, rigidly or mechanically.

(*Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, n. 6, (1981).) Despite those cautions, Mr. Sherlock seeks to invoke an imagined *per se* rule that an ADEA violation is established by the district court's statement that one of the School District's contentions was "not credible." Mr. Sherlock's argument presents a misstatement of law, and a wholesale mischaracterization of the facts.

In its entirety, the subject Finding of Fact 12 states:

> While it is not the Court's function to second guess the decisions of the Board of Trustees, when the overall budgets of the District are reviewed for the period in question, the District's contention that the sole purpose for the administrative reorganization was economy is not credible.
> (Petition Appendix, p. 7-8, emphasis added.)

First, the district court does not refer to Mr. Sherlock's "discharge," since it found that there was no discharge at all. (See discussion at pp. 6-9, *supra*.)

Secondly, the district court did not reject the District's explanation as "not credible"; rather, the court did not believe that economy was "the *sole* purpose for the administrative reorganization." The obvious flaw in Mr. Sherlock's argument was expressed by the Ninth Circuit (Petition Appendix, p. 35-36): the district court found that additional reasons -- -- other than Mr. Sherlock's age -- -- motivated the reorganization.[4]

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At page 17 of his petition, Sherlock asserts that the School District presented no evidence to support any explanation for its conduct other than "economy." To the contrary, the Court of Appeals expressly found such evidence (Petition Appendix, p. 36).
(continued)

There is nothing inconsistent between the district court's finding, and its conclusion that age was not a determining factor in Mr. Sherlock's discharge. Nor did this Court intend the *McDonnell Douglas* test to require that if a district court disbelieved any of the employer's contentions, a *per se* ADEA violation is found. Rather, Mr. Sherlock's argument reflects precisely the "rigid and mechanical" reading of *McDonnell Douglas* that this Court has consistently attempted to dispel.

CONCLUSION

Since Mr. Sherlock was not discharged, and chose neither to apply for the administrative jobs filled by two other men in their

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Moreover, even if Sherlock's argument had factual merit (and it does not), "insufficiency of the evidence" would provide no basis to grant certiorari.

fifties, nor to accept the teaching job to which he had tenure, the legal issues that he raises are moot. Once one reaches those issues, one finds that Mr. Sherlock has not presented them fairly. Upon a fair reading of those issues, it is clear that the Court of Appeals correctly followed the law set forth by this Court, consistent with the holdings of the remaining circuits.

For all of the reasons stated above, the Petition for a Writ of Certiorari should be denied.

DATED: August 15, 1986.

Respectfully submitted,

LAW OFFICES OF MARK SCHICKMAN

By _____
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APPENDIX A

CALIFORNIA EDUCATION

CODE §§ 44893 and 44951

§ 44893. Retention of permanent classification upon advancement of teacher

A permanent employee when advanced from a teaching position to an administrative or supervisory position, or assigned any special or other type of work, or given special classification or designation requiring certification qualifications, shall retain his permanent classification as a classroom teacher.

§ 44951. Continuation in position unless notified

Unless a certificated employee holding a position requiring an administrative or supervisory credential is sent written notice deposited in the United States registered mail with postage prepaid and addressed to his last known address by March 15 that he may be released from his position for the following school year or unless the signature of such an employee is obtained by March 15 on such written notice that he may be released from his position for the following year, he shall be continued in such position. The provisions of this section do not apply to a certificated employee who holds a written contract with an expiration date beyond the current school year, or to a certificated employee holding a position that is funded for less than a school year, or to a certificated employee assigned to an acting position whose continuing right to hold this position depends on his being selected from an eligible list established for the position, or to the termination of employment pursuant to Section 44955. A certificated employee serving under Section 35042 shall be notified by March 1 if the governing board determines on an individual basis that he may be released for the following school year.